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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, DEPARTMENT OF
TRANSPORTATION

Appellant/Petitioner,

vs.

MARINA KALANI-KEEGAN

Respondent.

SUPREME COURT DOCKET
NO. 40149-2012

KOOTENAI COUNTY DOCKET
CASE NO. CV2011-8174

APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE
FIRST JUDICIAL DISTRICT FOR KOOTENAI COUNTY

THE HONORABLE JUDGE JOHN STEGNER

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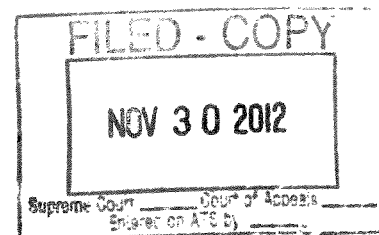


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STATEMENT OF THE CASE

A. Nature of the Case

This appeal is before the Court and filed by the Idaho Department of Transportation (ITD). Petitioner ITD requests this Court to reverse the decision of the District Court and the hearing officer who determined that the requirements of Idaho Code Section 18-8002A were not met and that Kalani-Keegan's driving privileges should be not be suspended.

B. Course of Proceedings

On June 10, 2011, Kalani-Keegan was arrested for Driving Under the Influence (DUI) by Trooper Chris Donahue of the Idaho State Patrol. Trooper Donahue served Kalani-Keegan with a Notice of Suspension. *R.*, *p.10-11*. On June 29, 2011, ITD sent Kalani-Keegan Notice of Administrative License Suspension, because she had failed the evidentiary test. *R. p. 31-33*. On or about July 5, 2011, Kalani-Keegan requested an administrative hearing on the proposed license suspension. *R.*, *p.18-20*. The administrative hearing was held on August 11, 2011, before Hearing Officer Dustin O. Jansen. *R.*, *p.42-48*. On August 11, 2011, the hearing officer issued his decision which vacated the ninety (90) day license suspension sought by ITD. *Id.*

On August 23, 2011, ITD filed a Motion for Reconsideration. The Motion included a statement from the notary who signed the probable cause affidavit, Dorie Mallory, the Regional Communications Director of the Idaho State Police. *R.*, *p.51-52*. On September 20, 2011, the Hearing Officer issued an Order denying ITD's motion for reconsideration. *R.*, *p. 68*. On October 7, 2011 ITD filed a Petition for Judicial Review.

The Petition for Judicial Review was assigned to the Honorable Judge Stegner. On June 5, 2012, the Court issued its decision upholding the decision of the hearing officer, vacating the suspension. On July 11, 2012, ITD filed a Notice of Appeal.

C. Statement of the Facts

On June 10, 2011, Kalani-Keegan was arrested for Driving Under the Influence (DUI) by Trooper Donahue of the Idaho State Patrol. The arrest occurred on US 95, near milepost 429. *R.*, pages 3-4. The Trooper had observed Kalani-Keegan's vehicle fail to maintain its lane of travel, so he stopped the vehicle. *R.*, pages 3-4. The Trooper detected an odor of alcohol. *Id.* After administering various field sobriety tests, Kalani-Keegan was offered an evidentiary breath test and she refused. *Id.* On June 10, 2011, Trooper Donahue served Kalani-Keegan with a Notice of Suspension. *R.*, pages 1-2.

On June 14, 2011, Trooper Donahue signed his Probable Cause Affidavit in Support of the Arrest. His affidavit was notarized by Dorie Mallory and sent to ITD. *R.*, p. 3-4. The Probable Cause Affidavit was received by ITD on June 17, 2011. *Id.*

Kalani-Keegan was given a blood test and the result was 0.180. *R.*, p. 18. On June 29, 2011, ITD sent Kalani-Keegan Notice of Administrative License Suspension, because she had failed the evidentiary test. *R.*, p. 20. On or about July 5, 2011, Kalani-Keegan requested an administrative hearing on the proposed license suspension. *R.*, p. 9-11.

The administrative hearing was held on August 11, 2011, before Hearing Officer Dustin O. Jansen. *See Hearing Transcript and R.*, p. 31-38. At the hearing, the attorney for Kalani-Keegan made no legal or factual argument and merely requested that the record remain open for 15 days. *Tr.*, p. 3-2. The request was granted. *Id.*

Later, on August 11, 2011 (the same day as the ALS hearing), the hearing officer issued his decision which denied the ninety (90) day license suspension. *R.*, *p.* 31-38. In summary, the hearing officer found:

- (1) Officer Donahue had legal cause to stop Kalani-Keegan's vehicle;
- (2) Officer Donahue had legal cause to believe Kalani-Keegan had violated Idaho Code Section 18-8004;
- (3) That the evidentiary tests indicated that Kalani-Keegan was in violation of Idaho Code Section 18-8004;
- (4) That the evidentiary tests were performed in compliance with all requirements set forth in Idaho Code and Standard Operating Procedures;
- (5) That the evidentiary testing instrument functioned properly when the test was administered;
- (6) That Kalani-Keegan was advised of the possible suspension of her driver's privileges; and
- (7) **That the required documents were not forwarded to the Department in compliance with Idaho Code.**

R., *pages 31 - 38 (emphasis added)*. In effect, the hearing officer refused to suspend the driver's license finding a problem with the required documentation sent to the hearing officer by ITD and law enforcement.

On August 23, 2011, ITD promptly filed a Motion for Reconsideration of the decision by the hearing officer. The Motion for Reconsideration contained a statement from the notary who signed the probable cause affidavit, Dorie Mallory, the Regional Communications Director of the Idaho State Police. *Id.*, *page 40 and 57*. In her statement, Ms. Mallory wrote:

"On June 14, 2011 Trooper Christopher T. Donahue **appeared before me** in Coeur d'Alene Idaho, **in my presence he signed** the PC Affidavit relating to the DUI arrest of Marina P. Kalani-Keegan on June 10, 2011. Case number C11001282."

R., *page 41 (emphasis added)*.

On September 2, 2011, Kalani-Keegan filed a Memorandum with the Hearing Officer in opposition to the Motion for Reconsideration. *R.*, *p.* 53-56. On September 20, 2011, the hearing

officer issued an Order denying the motion for reconsideration. *Id.*, page 57. In his Order, the hearing officer wrote:

A Motion for Reconsideration was filed on AUGUST 23, 2011 with the Idaho Transportation Department's Administrative License Suspension Hearing Unit. The Hearing Officer failed to act upon the motion within ten (10) days of its receipt. The motion is thereby deemed Denied, in accordance with Idaho Code Section 67-5243(3).

Id., p. 57. On October 7, 2011 ITD filed a Petition for Judicial Review. The matter was assigned to the Honorable John Stegner. After the matter was briefed by the parties, the District Court issued its Memorandum Decision on June 5, 2012. *R.*, p. 75-81. The District Court did not reach the merits of the appeal, instead, the District Court upheld the decision of the hearing officer on the grounds that ITD failed to show that a substantial right of the Department was prejudiced. *Id.*

ISSUES PRESENT ON APPEAL

- A. At an ALS hearing, does the hearing officer have authority to vacate a driver's license suspension on the grounds that the documentation provided by law enforcement and ITD was insufficient to support the license suspension?
- B. At an ALS hearing, when a hearing officer makes an incorrect legal and factual determination should the District Court reverse the decision of the hearing officer?

ARGUMENT

A. STANDARD OF REVIEW

The Idaho Administrative Procedures Act (IDAPA) governs the review of department decisions to deny, cancel, suspend, disqualify, revoke, or restrict a person's driver's license. *See* I.C. §§ 49-201, 49-330, 67-5201(2), 67-5270. Recently, in *Bennett v. State Department of Transportation*, 147 Idaho 141, 206 P.3d 505 (Ct App 2009) the Court of Appeals restated the necessary standard of review for the Court. The Court stated, in pertinent part:

This Court does not substitute its judgment for that of the agency as to the weight of the evidence presented. I.C. § 67-5279(1); *Marshall*, 137 Idaho at 340, 48 P.3d at 669. This Court instead defers to the agency's findings of fact unless they are clearly erroneous. *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998); *Marshall*, 137 Idaho at 340, 48 P.3d at 669. In other words, the agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial competent evidence in the record. *Urrutia v. Blaine County, ex rel. Bd. of Comm'rs*, 134 Idaho 353, 357, 2 P.3d 738, 742 (2000); *Marshall*, 137 Idaho at 340, 48 P.3d at 669.

A court may overturn an agency's decision where its findings, inferences, conclusions, or decisions: (a) violate statutory or constitutional provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record; or (e) are arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). The party challenging the agency decision must demonstrate that the agency erred in a manner specified in I.C. § 67-5279(3) and that a substantial right of that party has been prejudiced. *Price v. Payette County Bd. of County Comm'rs*, 131 Idaho 426, 429, 958 P.2d 583, 586 (1998); *Marshall*, 137 Idaho at 340, 48 P.3d at 669. If the agency's decision is not affirmed on appeal, "it shall be set aside . . . and remanded for further proceedings as necessary." I.C. § 67-5279(3).

Id., at 506-507.

The administrative license suspension (ALS) statute, I.C. § 18-8002A, requires that ITD suspend the driver's license of a driver who has failed a BAC test administered by a law enforcement officer. The period of suspension is ninety days for a driver's first failure of an evidentiary test and one year for any subsequent test failure within five years. I.C. § 18-8002A(4)(a). A person who has been notified of an ALS may request a hearing before a hearing officer designated by ITD to contest the suspension. I.C. § 18-8002A(7); *Kane v. State, Dep't of Transp.*, 139 Idaho 586, 590, 83 P.3d 130, 134 (Ct. App. 2003). The hearing officer must uphold the suspension unless he or she finds, by a preponderance of the evidence, that the driver has shown one of several grounds enumerated in I.C. § 18-8002A(7) for vacating the suspension.

Those grounds are:

- (a) The peace officer did not have legal cause to stop the person; or
- (b) The officer did not have legal cause to believe the person had been driving or was in actual physical control of a vehicle while under the influence of alcohol, drugs or other

intoxicating substances in violation of the provisions of section 18-8004, 18-8004C or 18-8006, Idaho Code; or

(c) The test results did not show an alcohol concentration or the presence of drugs or other intoxicating substances in violation of section 18-8004, 18-8004C or 18-8006, Idaho Code; or

(d) The tests for alcohol concentration, drugs or other intoxicating substances administered at the direction of the peace officer were not conducted in accordance with the requirements of section 18-8004(4), Idaho Code, or the testing equipment was not functioning properly when the test was administered; or

(e) The person was not informed of the consequences of submitting to evidentiary testing as required in subsection (2) of this section.

I.C. § 18-8002A(7). The hearing officer's decision is subject to challenge through a petition for judicial review. I.C. § 18-8002A(8); *Kane*, 139 Idaho at 589, 83 P.3d at 133.

B. DISCUSSION

The ALS hearing on this matter was held on August 11, 2011. No testimony was taken at the hearing, no documents were challenged and there was no legal argument presented by counsel for Kalani-Keegan. *Tr.*, pages 1-4. In fact, the record was left open by the hearing officer, providing Kalani-Keegan with an opportunity to supplement the record. *Id.*

In spite of this and, without any corroborating evidence, on August 11, 2011, the hearing officer made the following findings of fact and conclusions of law:

1. Idaho Code Section 18-8002A(5)(b) provides that within five business days following service of a notice of suspension the peace officer shall forward to the department, among other things, a sworn statement of the officer, which may incorporate any arrest or incident reports relevant to the arrest.
2. The probable cause affidavit acts as the sworn statement of the officer.
3. *Exhibit 2, the probable cause affidavit, does not contain the original signature of the police officer, thereby invalidating the notary certificate which follows.*
4. The probable cause affidavit does not meet the requirements of the Idaho Code.
5. Therefore, the required documents were not forwarded to the Department in compliance with Idaho Code.

Id., page 35 (*emphasis added*). The hearing officer apparently concluded that the signature of the police officer was not original.

In response, ITD promptly filed a Motion for Reconsideration. With its Motion, ITD provided with the hearing officer with a statement directly from the notary, Dorie Mallory. In her statement, she informed the hearing officer that his conclusion was wrong. She stated that

“On June 14, 2011 Trooper Christopher T. Donahue **appeared before me** in Coeur d’Alene Idaho, **in my presence he signed** the PC Affidavit relating to the DUI arrest of Marina P. Kalani-Keegan on June 10, 2011. Case number C11001282.”

R., page 41 (*emphasis added*).

The conclusion of the hearing officer is not legally or factual correct and suffers from two misconceptions: it misperceives *both* the permissible grounds for a challenge to a license suspension under Idaho Code Section 18-8002A(7) and the burden of proof at an administrative hearing.

**a. THE HEARING OFFICER LACKED LEGAL AUTHORITY
TO VACATE THE LICENSE SUSEPENSION**

There are only five grounds that the hearing officer may consider, which are set forth in Idaho Code Section 18-8002A(7). Idaho Code Section 18-8002A(7) specifies that the hearing officer “**shall not** vacate the suspension unless he finds” one of the five enumerated grounds to set aside a suspension.

None of the five grounds concern the adequacy of the documentation sent to ITD by the initiating law enforcement officer. Therefore, the hearing officer did not have statutory authority to use the quality of the probable cause affidavit as a ground to vacate the license suspension based upon an alleged technical flaw in the documents delivered to ITD. See *Kane v. State Department of Transportation*, 139 Idaho 586, 590, 83 P.3d 130, 134 (Ct.App.2003).

At the ALS hearing, the burden of proof was on the petitioner. Idaho Code Section 18-8002A(7). It was not ITD's burden at the ALS hearing to disprove any of the grounds for challenging a suspension. To the contrary, the statute directs that "the burden of proof shall be on the person requesting the hearing." Idaho Code Section 18-8002A(7). Assuming the sufficiency of the officer's signature was at issue, it was the petitioner's burden to prove, by a preponderance of the evidence, that the officer's signature was flawed. She failed. The record contains no evidence challenging the officer's signature.

There was simply no legal basis for the hearing officer to vacate the lawful imposition of the Administrative License Suspension. Therefore the license suspension must be upheld.

b. *THE ACTIONS OF THE HEARING OFFICER*
VIOLATED THE SUBSTANTIAL RIGHTS OF ITD.

The District Court chose not to reach the merits of this appeal. Citing Idaho Code Section 67-5279(4), the District Court ruled that ITD did not establish its substantial rights were prejudiced by the hearing officer's decision. ITD respectfully disagrees with the holding and analysis by the District Court.

In recognition of the serious error made by the hearing officer, ITD filed a Motion for Reconsideration. The Motion included a statement by the notary who notarized the officer's signature. Motions to Reconsider are provided for in Idaho Code Section 18-8002A(7)(e), which states in pertinent part:

The findings of fact, conclusions of law and order entered by the hearing officer shall be considered a final order pursuant to the provisions of chapter 52, title 67, Idaho Code, except that motions for reconsideration of such order shall be allowed and new evidence can be submitted.

Idaho Code Section 18-8002A does not offer much guidance as to the form of the new evidence to be considered by the hearing officer. However, there are sections of Idaho's

Administrative Procedures Act (IDAPA) that sheds some light on these issues. IDAPA

39.02.72.003 provides that:

All Administrative License Suspension appeals pursuant to Section 18-8002A , Idaho Code, shall be governed by this rule and IDAPA 04.11.01, "Idaho Rules of Administrative Procedure of the Attorney General," in so far as they apply. (10-1-94).

The Rules of Administrative Procedure of the Attorney General provides that following guidance for administrative hearings.

IDAPA 04.11.01.052. LIBERAL CONSTRUCTION

The rules in this chapter will be liberally construed to secure just, speedy and economical determination of all issues presented to the agency. Unless prohibited by statute, the agency may permit deviation from these rules when it finds that compliance with them is impracticable, unnecessary or not in the public interest. Unless required by statute, the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence do not apply to contested case proceedings conducted before the agency. (7-1-93)

IDAPA 04.11.01.600. RULES OF EVIDENCE - EVALUATION OF EVIDENCE

Evidence should be taken by the agency to assist the parties' development of the record, not excluded to frustrate that development. The presiding officer at hearing is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of taking testimony invalidates any order. The presiding officer, with or without objection, may exclude evidence that is irrelevant, unduly repetitious, inadmissible on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of Idaho. All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs. The agency's experience, technical competence and specialized knowledge may be used in evaluation of evidence. (7-1-93)

Here, the hearing officer was provided with a statement by Dorie Mallory which verified (again) the authenticity of the signature of the officer and the authenticity of her notarization of his signature. This evidence was submitted to assist the hearing officer in developing and correcting the record and his incorrect findings of fact. Dorie Mallory's letter was never refuted. Further, the informality of her statement does not preclude it from agency's record. Formal affidavits and/or oral testimony by an ITD employee are not required because the formal rules of

evidence do not apply to these agency proceedings. Therefore, the hearing officer was wrong when he failed to consider the statement by Ms. Mallory and reverse his decision. This action by the hearing officer violated the substantial rights of ITD which was to expect the hearing officer to be reasonably fair and to apply proper legal standards.

The concept of “substantial rights” was recently discussed by the Idaho Supreme Court in the land-use case of *Hawkins v. Bonneville County Board of Commissioners*, 151 Idaho 228, 254 P.3d 1224 (2011). The Court stated the following:

Generally, as a procedural matter, all the parties involved in a land-use decision have a substantial right to a reasonably fair decision-making process. Governing boards owe procedural fairness not just to applicants but also their interested opponents. Both should expect proceedings that are free from procedural defects that might reasonably have affected the final outcome. *See Noble v. Kootenai Cnty.*, 148 Idaho 937, 942-43, 231 P.3d 1034, 1039-40 (2010) (holding that, even though the county board disallowed the public from participating in a site visit, doing so did not likely affect the decision); *Eacret v. Bonner Cnty.*, 139 Idaho 780, 787, 86 P.3d 494, 501 (2004) (vacating a county board's decision due to a commissioner's likely bias). This includes the right for all interested parties to have a meaningful opportunity to present evidence to the governing board on salient factual issues. *Cnty. Residents Against Pollution from Septage Sludge v. Bonner Cnty.*, 138 Idaho 585, 588-89, 67 P.3d 64, 67-68 (2003); *Sanders Orchard v. Gem Cnty. ex rel. Bd. of Cnty. Comm'rs*, 137 Idaho 695, 702, 52 P.3d 840, 847 (2002).

Id., at 233-4, 254 P.2d at 1229-30. Likewise, in an ALS proceeding, all parties involved have a substantial right to a reasonably fair decision-making process. Both the petitioners and ITD should expect proceedings that are free from procedural defects that might reasonably affect the final outcome.

The *Hawkins Court* also found that the applicants for land use permits have particular rights. The Court found:

Of course, assuming that a decision is procedurally fair, *applicants* for a permit also have a substantial right in having the governing board properly adjudicate their applications by applying correct legal standards. *Lane Ranch P'ship v. City of Sun Valley*, 145 Idaho 87, 91, 175 P.3d 776, 780 (2007); *cf. Sagewillow, Inc. v. Idaho Dep't of Water Res.*, 138

Idaho 831, 842, 70 P.3d 669, 680 (2003) (remanding because the agency misstated the relevant legal standard and denied an application to transfer water rights).

Id. Therefore, applying the same reasoning, ITD has a substantial right in having the ALS hearing officer properly adjudicate the ALS hearing by applying the correct legal standards.

The substantial rights of ITD were clearly violated by the actions of the hearing officer. Here, the hearing officer found that the documents provided by law enforcement were procedurally insufficient, which was contrary to the undisputed evidence and contrary to the legal standards to be applied by a hearing officer. ITD had a substantial right to expect that the hearing officer would properly adjudicate this matter. Those rights were violated when the hearing officer when the hearing officer improperly adjudicated case.

CONCLUSION

The hearing officer did not comply with the mandates of Idaho Code Section 18-8002 and 18-8002A and in the process, violated substantial rights of ITD to a fair and legal hearing. Accordingly, ITD respectfully requests this Court to reverse the decision of the hearing officer and uphold the suspension of the respondent's driver's license.

Dated this 28 day of November, 2012.

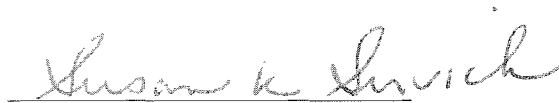
By: Susan K. Servick
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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the APPELLANT'S BRIEF were transmitted, November 28, 2012 by the following method, to:

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☐ Fax
☒ Mail

A handwritten signature in cursive script, reading "Susan K. Servick", written over a horizontal line.

Susan K. Servick